

BEFORE THE

~~DUPLICATE~~

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

1998 Biennial Regulatory Review -
Streamlining of Mass Media Applications,
Rules, and Processes)

MM Docket 98-43

Policies and Rules Regarding
Minority and Female Ownership of
Mass Media Facilities)

MM Docket 94-149

To: The Commission

PETITION FOR RECONSIDERATION

Central Florida Educational Television, Inc. ("Central Florida") and Good Life Broadcasting, Inc. ("Good Life") (jointly "Petitioners") hereby seek reconsideration of the Report and Order in the above-captioned proceeding. *1998 Biennial Regulatory Review - Streamlining of Mass Media Applications, Rules, and Processes*, FCC 98-281 (MM Docket Nos. 98-43 and 94-149) (released November 25, 1998) (the "Report and Order").

Petitioners seek reconsideration of the retroactive application of the change in Section 73.3598 of the Commission's rules, which provides for automatic forfeiture of a construction permit upon the expiration of a three-year construction period, to existing permittees for whom the three-year period has already expired. Petitioners respectfully contend that the retroactive application of this rule change to permittees such as Central Florida who are unable to

construct because of the pendency of adjudicatory proceedings -- without providing any type of transition period -- is inequitable and contrary to the public interest. Accordingly, Petitioners respectfully request that the Commission partially grandfather existing construction permits and provide that any construction permit that has expired but is not the subject of a final cancellation order as of February 16, 1999 will be extended for twelve months.

I. Under The New Rules, The FCC Will No Longer Extend Construction Permits; Rather, Construction Permits For Stations Not Constructed Within The New Three-Year Construction Period Will Be Automatically Cancelled.

In the Report and Order, the Commission established a new three-year construction period for broadcast radio and television stations. Previously, the construction period for television stations was two years and for radio stations, 18 months, 47 C.F.R. § 73.3598 (1997 ed.).

The previous rules contained procedures for applying for the extension of a construction permit or for the issuance of a new construction permit to replace an expired permit. Under the previous rules, the Commission would extend a construction permit upon a showing by the permittee that one of three circumstances applied: (1) construction was complete and testing was underway; (2) substantial progress had been made; or (3) no progress had been made for reasons clearly beyond the control of the permittee but the permittee had taken all possible steps to expeditiously resolve the problem and proceed with construction. 47 C.F.R. § 73.3534

(1997 ed.).¹

Under the FCC's new rule, the FCC will not extend a construction permit. Instead, the construction period may be "tolled," but only during the period when (1) construction is prevented by a natural disaster; (2) the grant of the permit is subject to administrative or judicial review; or (3) construction is delayed by any cause of action pending before any court of competent jurisdiction relating to any necessary local, state or federal requirement for the construction or operation of the station.

The previous rules required an affirmative action by the FCC prior to the cancellation of a construction permit. Cancellation or forfeiture at the end of the construction period was not mandatory. Instead, the previous rules provided that the Commission could declare a construction permit forfeited if the station was not ready for operation within the time specified within the construction permit "or within such further time as the FCC may have allowed for completion." 47 C.F.R. § 73.3599 (1997 ed.). In contrast, the new rules provide that if construction is not completed and an application for license filed within the construction period, the construction permit "shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission." See revised Rule 73.3598.

¹ The previous rules also provided for the automatic extension of a construction permit in the event of either the modification of the permit -- in which case, a six-month extension was granted -- or the assignment of a permit -- in which case a twelve-month extension was granted. 47 C.F.R. § 73.3535(c). The Commission repealed this rule in the Report and Order. Additional time will no longer be allowed in the cases of modifications or assignments. Report and Order at ¶ 84.

II. In The Report And Order, The FCC Applied The New Automatic Cancellation Rules Retroactively Against All Existing Permittees Even Those Unable To Construct Because Of The Pendency Of Extension Or Reinstatement Requests.

As with any new rule, the Commission was compelled in the Report and Order to consider its application to existing permittees. In making this determination, the Commission divided permittees holding construction permits into three categories. The first category consists of construction permits in their initial construction period and/or an initial extension request. In general, such construction permits will be automatically extended to three years from the date of the initial construction permit. Report and Order at ¶ 89.

The second category of permittees are those who are authorized to construct pursuant to a second or subsequent extension of their construction permit. Again, such permits will generally be automatically extended to three years from the initial grant date of the construction permit. Id.

The third category consists of those permittees holding expired construction permits, which is the category of concern to Petitioners. The Commission first determined that construction permits that have expired and for which the permittee failed to seek reconsideration of the cancellation and forfeiture action should be forfeited on the grounds that the cancellation and forfeiture action has become a final action. See Report and Order at ¶ 89. Petitioners do not question this decision. However, the Report and Order goes further: it provides that any expired

permit that has been in existence for at least three unencumbered years will be automatically cancelled even if the permit has not been cancelled through a final order and even if the question of whether the permit should be extended or reinstated is still the subject of pending litigation.

III. The Retroactive Application Of The New Rules To Certain Existing Construction Permits Is Unfair and Inequitable.

Needless to say, the Commission's decision to apply the new rule retroactively creates some transitional problems and inequities. Petitioners submit that in the case where a permittee has been unable to construct because of the pendency of litigation regarding its construction permit, the Commission's decision to subject such a permit to automatic forfeiture is inequitable and contrary to the public interest.

Central Florida's situation presents a case in point of an inequity resulting from the retroactive application of the new rule. On March 30, 1987, Central Florida was granted a construction permit for noncommercial, educational television station WLCB-TV, to operate on Channel 45 in Leesburg, Florida. On September 10, 1992, the Mass Media Bureau ("Bureau") denied Central Florida's request for a further extension of the permit. Central Florida timely sought reconsideration, which was denied, and then filed an application for review. By letter dated July 25, 1996, the Bureau reinstated and extended the WLCB construction permit. The Bureau found that "substantial progress had been accomplished" and the grant of an extension "could serve the public interest objective of facilitating an assignment to an assignee who will

undertake to promptly complete construction and initiate a new television service"²

However, the Bureau did not actually issue a construction permit to Central Florida, and Central Florida therefore had no authority to construct. Thus, while the Bureau *granted* Central Florida's request for reinstatement of the construction permit for WLCB, the FCC never actually issued the permit.

In sum, Central Florida has been unable to take any steps towards construction of WLCB since 1992. A permittee may not be faulted for not constructing during the pendency of an extension or reinstatement application or while a grant of a construction permit is clouded by a pending administrative or judicial challenge. See California State University, Sacramento, 13 FCC Rcd. 17960, 17964-65 (1998) ("California State"). This policy is designed to avoid the manifest unfairness that could result from requiring a permittee to make further expenditures and continue construction efforts where its permit could be subsequently cancelled. *Id.*

Notwithstanding that Central Florida has been unable to construct since 1992, under the new rules adopted in this proceeding, the WLCB construction permit will automatically expire on February 16, 1999, unless the Commission makes the change requested herein.

² Consistent with the Bureau's decision, Good Life and Central Florida have filed an application with the Commission seeking consent to the assignment of the WLCB construction permit from Central Florida to Good Life (File No. BAPET-961113IA). The assignment application has been opposed by Press Communications, LLC, on the grounds that the Bureau's July 25, 1996 decision was ultra vires and therefore invalid and that Central Florida's permit has expired. The application remains pending.

The Commission's determination to automatically cancel all expired construction permits that have been outstanding for more than three encumbered years is particularly inequitable to permittees that have filed timely requests for reinstatement and extension because, although it is clearly possible and even probable that the Commission or the courts might conclude that their permits should be reinstated, such permittees cannot construct their stations while their reinstatement applications are pending. California State, supra. Thus, such permittees do not even have the opportunity that is available to a permittee holding a permit that had been outstanding three or almost three "unencumbered" years when the Commission announced its adoption of a new substantive rule in the Report and Order to complete construction prior to the later of the effective date of the new rules -- February 16, 1999 -- or the expiration of the permit.³

Permittees like Central Florida are truly in limbo. They cannot construct because their permits have expired, and effective February 16, 1999, the permits will be automatically forfeited under the new rules, notwithstanding that no final decision was ever reached on their pending requests for extension or reinstatement.

The automatic cancellation of Central Florida's construction permit under these circumstances is fundamentally unfair. Central Florida obtained its permit pursuant to rules

³ Although Central Florida's permit was previously reinstated by the Commission, it is in the same situation as permittees whose permits have expired and who have filed timely requests for reinstatement because it never received a construction permit and thus had no authority to construct, and the validity of the Bureau's reinstatement of its permit is now subject to challenge.

under which the FCC routinely extended or reinstated construction permits under circumstances that will no longer apply. While Central Florida does not dispute the Commission's right to make such changes, Central Florida believes that permittees like itself that have relied upon the old rules should be either grandfathered or allowed a reasonable transition period to adopt to the new standards.

Central Florida recognizes that the Commission's goal in changing the rules was "to substantially reduce paperwork and administrative burdens on permittees and the number of requests for additional time to construct while promoting the expeditious construction of stations." Report and Order at ¶ 79. The modification to the rules requested by Petitioners is consistent with this goal. Petitioners suggest that the Commission automatically extend or reinstate for twelve months all expired permits that have not yet been cancelled by final order. By automatically extending or reinstating such permits the FCC will achieve its goal of reducing the staff time spent handling and ruling on requests. A twelve-month period will give permittees desiring to construct stations and initiate service realistic time to do so. If they do not, the Commission will have provided them with fair warning of the impact of their failure as well as ample opportunity to construct. The Commission would therefore clearly have a valid basis to subject such permits to automatic cancellation at the end of the transition period.

The alternative -- leaving the rule unchanged -- would neither reduce administrative burdens nor promote new service. Permittees whose extension or reinstatement requests are the subject of pending litigation are likely to continue to litigate the question of whether their permits can be automatically cancelled without any final ruling on the underlying

merits of their requests. Or such permittees are likely to pursue waiver requests. Clearly, therefore, as far as these permittees are concerned, the new rules will likely result in increased, as opposed to substantially reduced, paperwork and administrative burdens for the permittees and the Commission.

Moreover, if such permits are automatically cancelled, the result will not be the expeditious initiation of new service. To the contrary, in the case of television station permits, the opposite will be true because the FCC is no longer accepting applications for construction permits for new television broadcast stations on vacant NTSC allocations. The automatic cancellation of permits caught in the transition will therefore prevent, not expedite, new service.

IV. Conclusion

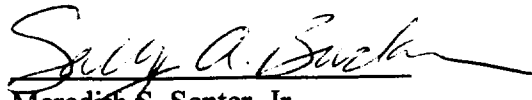
It would be manifestly unfair for the FCC to automatically cancel expired construction permits where the permittees currently are unable to construct because of pending litigation. By providing for a transition period for such permittees, the Commission will further its goal of reducing administrative burdens and promoting expeditious construction of stations. Accordingly, Petitioners respectfully request that the Commission reconsider its decision in this

proceeding and adopt a transition period that would grant permittees holding expired construction permits that have not been cancelled though a final order an additional twelve months to construct their stations.

Respectfully submitted,

**CENTRAL FLORIDA EDUCATIONAL
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GOOD LIFE BROADCASTING, INC.

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